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REMARKS

Applicants courteously solicit favorable reconsideration of this application upon entry of the present Amendment.

Applicants present elected claims 1-7, 16-18, 21, and 22-23. Minor editorial revisions to claims avoid new matter and new issues.

Applicants have labeled claim 22 as "withdrawn" (without prejudice) in response to the Office Action, but candidly question the basis for deeming a product-by-process claim non-elected. It is respectfully submitted that the Examiner should re-open prosecution as to all claims.

Applicants traverse the rejection of claims 1-7, 16-18, and 21 under 35 U.S.C. §103(a) as being unpatentable over Kettlitz et al. (U.S. 6,235,894) in view of Daenzer-Alloncle et al. (U.S. 6,139,896). It is respectfully submitted that the rejected and added claims are both novel and unobvious over the cited references.¹

The elected claims pertain to a UHT-treated, product that has a relatively low viscosity after heat treatment (UHT). It can be sterilized. The UHT-treated product is reheatable and when reheated exhibits a viscosity increase as recited in claim 1 as an example.

¹ Applicants have previously pointed out that the USP to Kettlitz is a counterpart to the Kettlitz EPO patent publication that is cited in their application.

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Applicants' claim 1 provides "a UHT-treated product comprising a stabilized starch n-alkenyl succinate as a texturizing agent and wherein, after UHT-treatment, said UHT-treated product has a viscosity between 0.10 to 0.50 times the viscosity obtainable after re-heating of said UHT-treated product."

The prior art does not teach "a UHT-treated product comprising a stabilized starch n-alkenyl succinate as a texturizing agent..."

The prior art does not teach "wherein, after UHT-treatment, said UHT-treated product has a viscosity between 0.10 to 0.50 times the viscosity obtainable after re-heating of said UHT-treated product."

Applicants courteously submit the references do not teach the present inventions, would not have been combined, and furthermore even if, *arguendo*, they were combined the elected claimed inventions would have been unobvious to a person of ordinary skill in the art.

There would have been no expectation that a person of ordinary skill in the art would have been led to combine the references. There is no prior art-inspired rationale for arriving at the present invention, nor a prior art driven reason to combine Kettlitz '894 and Daenzer-Alloncle '896.

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First, the primary reference, Kettlitz '894, is wide of the mark as it discloses stabilized starches that only *maintain/retain* their pre-existing viscosity even after reheating. That would not have suggested the increase in viscosity as recited in the pending claims. As to the 'first' point, Kettlitz specifically refers to "heat-stable high viscosity starches" in the Abstract. At column 4, lines 5-16, Kettlitz '894 states:

The starches of the present invention show only a slight decrease of viscosity during the measurement with the Brabender viscopgraph, preferably the drop in viscosity is less than 20%, more preferably less than 10% during heating at 95°C.

Accordingly, Kettlitz '894 specifically indicates to those skilled in the art that its stabilized starches should not manifest an increased viscosity upon reheating or further heat treatment. Kettlitz '894 specifically states that the viscosity is retained/maintained with *only* minimal decreases upon reheating or further heat treatment.

Second, Kettlitz '894 does not describe nor would it have suggested the food stuffs as claimed herein, and certainly "Kettlitz et al do not specifically disclose UHT treatment of food products" (Office Action, page 4).

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Third, Daenzer-Alloncle '896 refers to fluid lactic creams, and those who are skilled in the art understand that such fluid lactic creams are consumed 'as is' after a UHT treatment, and thus there would have been no reason to re-heat a fluid lactic cream, nor a reason to increase its viscosity (thickening effect) after heating the already UHT food product.

Fourth, Daenzer-Alloncle '896 refers a viscosity of 250 to 1600 mPas, whereas Applicants' claim 7 states that after UHT treatment the viscosity is less than 1500 mPas, but after reheating it's above 2000 mPas. Neither Kettlitz '894 nor Daenzer-Alloncle '896 would have suggested the white sauce of Applicants' claim 7, claim 17, or claim 18, as examples.

The following and other shortcomings in Kettlitz '894 are not overcome by reliance on the secondary reference to fluid lactic creams:

- Kettlitz '894 does not disclose UHT-treated food products. Kettlitz '894 does not specifically disclose UHT treatment of a food product. That's admitted in the Office Action, page 4.
- Kettlitz '894 does not additionally disclose reheating a UHT-treated food product.

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- Kettlitz '894 does not disclose, describe, or suggest that a reheated UHT-treated food product would demonstrate an increase in viscosity in accordance with Applicants' elected claims.
- There is no cited factual basis in Kettlitz '894 to support the assertion (Office Action, page 5) that "viscosity after reheating, this characteristic would have been expected to be in the claimed range..." It is a well-known basic patent principle that the inherency of an advantage and its obviousness are entirely different questions, because that which is inherent is not necessarily known. *In re Sporman*, 150 U.S.P.Q. 449, 452 (CCPA 1967).
- It is therefore irrelevant whether Kettlitz '894 (or the EP counterpart, EP 0-811633) disclose chlorine treated n-alkenyl succinates. The reference does not describe "UHT treated products," nor would it have suggested that a reheated UHT product would have an increased viscosity.

As to any or all of the foregoing points, if the Examiner disagrees with Applicants and contends otherwise, and in the absence of specific passages from Kettlitz '894 being cited in the Office Action, Applicants request the Examiner to supply an Examiner's

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affidavit so that they can address facts in the record. Otherwise, Applicants courteously suggest the rejection should be withdrawn.

Now reverting back to the 'third' point above, and further to stress why the references would not have been combined, Applicants submit Kettlitz '894 would not have been combined with the secondary reference to Daenzer-Alloncle because the latter's fluid lactic cream product is not even meant for reheating. Therefore, if one of ordinary skill in the art were considering a reheatable UHT-treated product and considering viscosity retention or even increasing viscosity, the secondary reference to Daenzer-Alloncle would not have been among the information and literature considered.

Indeed, the secondary reference seeks to provide a fluid lactic cream having good viscosity despite reduced fat content. It is consumed 'as is' without any reheating, nor does it suggest reheating to achieve a thickening effect since such an effect is not germane to a fluid lactic cream.

The secondary reference requires that no phase separation occur during storage as can be seen in column 1, lines 20-25. The flavored cream can be used for cooked, fresh, refrigerated, or deep-frozen dishes. The flavored sweet cream can also be used as a topping on fruit or ice cream or even as a dessert cream. The cream

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obtained can be preserved at room temperature for 6-12 months, during which time there should be no separation of fat and no formation of whey, as further described at column 2, lines 40-43. This is entirely consistent with Examples 1-4 in the secondary reference.

Therefore, taking the combined references at face value, the use of a stabilized heat-treated starch according to the Kettlitz '894 patent, even if considered with the product according to Daenzer-Alloncle, would simply have led - *arguendo* - to a product having a retained/maintained viscosity and that might be storage-stable. It is said to be "might be" because there is nothing according to the Kettlitz '894 patent that would have commended its products for a long-term storage-stable cream product as described and required by the secondary reference to Daenzer-Alloncle.

In short, even if *arguendo*, a low viscosity after UHT and a high viscosity after reheating might be an inherent feature of the starches recited in Applicants' claims, the person of ordinary skill in the art would find no incentive or reason to select for UHT-treated products that particular starch for solving Applicants' problem. Restated, Applicants confronted a problem needing a solution, namely, the provision of a heat-treated, sterilized product having a relatively low viscosity after heat treatment, but

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displaying an increased viscosity when reheated. Indeed, a person skilled in the art would not even have regarded the products of Kettlitz' 894, which are starches stabilized with stabilized with active chlorine, as even being suitable for solving such a problem, since the reference neither mentions UHT-treatment and, furthermore, is simply directed to products that maintain a high viscosity upon reheating or cooling. These gaps in the teachings of the prior art cited against the claims are not bridged by the fluid lactic cream products according to Daenzer-Alloncle.

Applicants, therefore, courteously solicit favorable reconsideration and allowance. Upon indication of allowable subject matter, Applicants authorize the Examiner to cancel without prejudice or disclaimer the non-elected claims in order to place the application in condition for allowance.

The Examiner is courteously invited to contact Applicants' legal representative in an effort to resolve any remaining issues.

To the extent necessary during prosecution, Applicants hereby request any required extension of time not otherwise requested and hereby authorize the Commissioner to charge any omitted fee required to secure entry of this Amendment, including application processing,

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extension, and extra claims fees, to Deposit Account No 06-1135
regarding our order number 7393/84061.

Respectfully submitted,
FITCH, EVEN, TABIN & FLANNERY

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